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ABSTRACT

The implications and shortcomings of court rulings on negligence in libel laws are explored in this paper. The paper first discusses the particulars of the 1974 landmark "Gertz versus Robert Welch, Inc." United States Supreme Court case, in which the court ruled that private persons as well as public figures would be required to prove some degree of fault on the part of libel defendants. Noting that as a result of this case three general standards of fault for private persons have evolved (actual malice as the most severe and negligence as the least severe), the paper reviews the precedents to the "Gertz" case and examines the way individual state courts have handled the question of negligence. The paper then proposes a workable negligence standard, and ways that journalists can avoid negligence rulings against themselves. Negligence standards listed by states, as well as standards of undecided states leaning toward negligence, are appended. (HTH)

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Negligence 10 Years *After Gertz v. Welch*

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W. WAT HOPKINS

Negligence 10 Years After Gertz v. Welch

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MORE THAN 10 years ago the U.S Supreme Court added the word "negligence" to the vocabulary of libel law. Negligence, of course, was not a new term to tort law. Since the early 19th Century negligence had been recognized as a separate tort — a cause of action unto itself.[1] In 1974 the Court applied negligence to defamation. For the first time, a majority of the Court agreed that all private persons bringing libel suits against media defendants must prove some degree of fault. The minimum standard of fault was acknowledged to be negligence.

Until 1974, when the Court handed down its landmark ruling in *Gertz v. Robert Welch, Inc.*,[2] a libel plaintiff who was a private person not involved in an issue of public concern could win a verdict upon showing that he was defamed in a communication published by the defendant. The *Gertz* ruling added to the plaintiff's burden of proof. The Court ruled that private persons, along with public officials and public figures, would be required to prove some degree of fault on the part of a defendant. There would be no liability without fault. The measure of fault for the private person was left to the determination of individual states.[3]

As a result of the *Gertz* ruling, three general standards of fault for private persons have evolved, with actual malice, as defined by *New York Times v. Sullivan*,[4] as the most severe standard and negligence[5] as the least severe. Only one state has selected a standard other than negligence or actual malice.[6]

The *Gertz* ruling prompted an abundance of commentary, much of it

aimed at the new fault requirement. Some commentators applauded the ruling.[7] Others argued that the negligence standard is dangerous because it increases the possibility that judges and juries could penalize unpopular speech[8] or it would prompt self-censorship.[9] They argued that defining negligence is not nearly as easy as the Supreme Court indicated it might be.

As it turns out, 10 years after *Gertz*, many questions about the negligence standard remain unresolved. For example, if negligence is defined as a breach of a standard of conduct,[10] against what standard of conduct will the breach be measured? Will it be what a "reasonable man" would consider a breach of conduct or will it be a breach of the standard of professional conduct within the media? That is, will negligence be determined by a "journalistic malpractice" or a "reasonable care" standard? Which standard is best? If the standard is journalistic malpractice, will all types of media be judged based upon the same standard of conduct? Who will determine what the proper standard of professional conduct is within any medium? Is there any way journalists can ensure that they are not negligent in the preparation and publication of material? Ten years after *Gertz* answers to some of these questions remain elusive.[11] This monograph reviews the precedents to *Gertz* and examines the way state courts have handled the question of negligence. The paper then proposes a workable negligence standard and ways journalists can avoid rulings that they have been negligent.

Background

From Times v. Sullivan to Gertz v. Welch. Until 1964, when the Supreme Court changed the face of libel law with its ruling in *Times v. Sullivan*, the common law rule of libel in most jurisdictions was strict liability. A libel plaintiff, under this rule, would win his case by showing that the communication published about him was defamatory.

The rule of strict liability was part of the British heritage in American libel law. Under British common law, malicious intent was assumed and, at least until 1792,[12] the mere fact of publication was the sole issue for the jury in libel trials.[13] That tradition carried over to the colonies. Even after a jury freed John Peter Zenger on grounds that the act of publishing was not enough, and that the words must be shown to be false, libel law was virtually unchanged.[14] Though the notion of truth as a defense for libel evolved in the United States, a true libertarian theory of the press lagged behind. The controlling theory of the press was Blackstonian — the press was free to publish but must take the consequences accompanying the publication of any falsehoods. A major change in theory occurred in 1964.

The *Times* case was the result of a lawsuit brought against the paper

by Montgomery, Alabama, police commissioner L.B. Sullivan. Sullivan sued the *Times* because of an editorial advertisement by the Committee to Defend Martin Luther King and the Struggle for Freedom in the South. The advertisement, in an effort to raise funds, recounted a number of events in the South the Committee believed showed prejudice against the civil rights movement and harassment of King. Sullivan was not mentioned by name in the advertisement, but apparently believed that criticism of actions attributed to the Montgomery police was tantamount to criticism of the police commissioner.

Sullivan showed in court that the advertisement contained a number of minor inaccuracies,[15] and that the *Times* could have discovered the inaccuracies if members of the advertising department had checked the newspaper's files.[16] Seven witnesses testified that they read the advertisement after it was shown to them by Sullivan's attorney. Each witness testified that he believed the material to be true. In addition, no witness said he thought less of Sullivan after reading the ad.[17] Nevertheless, Sullivan won a $500,000 verdict against the *Times* — a verdict upheld by the Alabama Supreme Court.[18]

But the U.S. Supreme Court said strict liability was insufficient for a public official to win a libel verdict. Error is inevitable in free debate, the Court ruled, and should not be punished. To do so would stifle robust and open debate about government officials and their duties.[19] Therefore, the Court ruled, a public official, in order to win a libel verdict, must also prove "actual malice." The Court defined actual malice as knowledge of falsity or reckless disregard as to whether the material is true or false.[20] First Amendment advocate Alexander Meiklejohn, who had long espoused a more liberal reading of the First Amendment when matters under discussion fell within the area of self-governance,[21] called the ruling "an occasion for dancing in the streets."[22] And the ruling began an evolution of libel law by the Supreme Court that moved decisively toward encouragement of a free press.

Within two years, the Court issued two rulings expanding the constitutional protection it had established in *Sullivan*. In *Garrison v. Louisiana*[23] the Court ruled that actual malice must be shown in cases of criminal libel as well as civil libel when plaintiffs are public officials. Whether criticism of public officials was made with ill-will is irrelevant to the case, the Court ruled.[24] Additionally, anything which might touch on an official's fitness for office may be commented upon with conditional protection.[25]

In *Rosenblatt v. Baer*[26] the Court rejected the argument that definitions of public officials made by states should be used to determine whether a libel plaintiff is a public official.[27] Rather, the Court ruled, any government position in which the public has an independent interest in the qualifications and performance of the officeholder, beyond the general public interest in the qualifications and performance of all government

employees, is a position held by a public official.[28]

Then, in 1967, the Court ruled, in a pair of cases under the title *Curtis Publishing Co. v. Butts*,[29] that a public figure must also prove actual malice. Public figures were identified as persons who commanded a substantial amount of independent public interest, either by position alone or by the "thrusting" of personality into the "vortex" of an important public controversy.[30]

In *St. Amant v. Thompson*[31] the Court apparently attempted to give some guidance to lower courts in defining "reckless disregard." While reckless desregard "cannot be fully encompassed in one infallible definition,"[32] the Court ruled, "There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication."[33]

What appeared to be the ultimate expansion of the *New York Times* rule came in 1971 with *Rosenbloom v. Metromedia, Inc.*[34] There was no majority in the case. The rule established in *Rosenbloom* was that actual malice must be shown in cases in which matters of public or general interest are discussed, even when the libel suit is brought by a private person. Only three justices agreed on that rule, however, so the state of libel law was very unsettled.

The Court soon got its chance to try to settle some of the questions it had raised. Three years and three weeks after the Supreme Court ruled in *Rosenbloom*, and almost 10 years after it ruled in *Times v. Sullivan*, the Court again changed the face of libel law.

Gertz v. Robert Welch, Inc. In 1968 a Chicago policeman named Richard Nuccio shot and killed a youth. Nuccio was convicted of second-degree murder, but the youth's family retained Elmer Gertz, a well-known Chicago attorney, to represent the family in a civil rights action against Nuccio. *American Opinion* magazine printed an article titled "Frame-up: Richard Nuccio and the War on Peace" in which it portrayed Gertz as part of a Communist campaign against the police. He was falsely called a Leninist, a Communist-fronter, a member of the Marxist League for Industrial Democracy, and a member of the Inter-Collegiate Socialist Society.

The trial court found that Gertz was a public figure and that he failed to prove actual malice. The appeals court affirmed.[35] But the U.S. Supreme Court reversed the decision and remanded the case for trial. Justice Powell, writing for the five-man majority, ruled that Gertz was not a public figure, despite a long list of publications and his active involvement in community affairs.[36] A private plaintiff, the Court added, also must prove that the publisher or broadcaster was guilty of some degree of fault before being able to win a libel verdict.[37] At least, the Court ruled, citing *Curtis Publishing*, that would be the case where the substance of the defamatory statement made substantial danger to reputation apparent.[38]

The Court ruled that the states could define the appropriate standard of liability in private-person cases.[39] In addition, the Court ruled that punitive damages may only be awarded upon a showing of actual malice and that compensatory damages may not be awarded without a showing of actual damages.[40]

The Court was split, though not as badly split as in *Rosenbloom*. Justice Blackmun, in his concurring opinion, said he preferred the *Rosenbloom* rule, but joined to make a majority, hoping to eliminate the "unsureness" created by the earlier decision.[41] Burger, Douglas, Brennan and White each filed a dissenting opinion. Burger said that, though he agreed with the judgment of the Court in *Gertz*, he did not know the parameters of a negligence doctrine as applied to the news media and said he would prefer to allow "this area of law to continue to evolve . . . rather than embark on a new doctrinal theory which has no jurisprudential ancestry."[42] Douglas held to his long-time stance that there should be no defamation laws under the First Amendment.[43] Brennan held to his *Rosenbloom* opinion that the *New York Times* rule should apply to individuals involved in events of general or public concern.[44] White disagreed with the notion that private individuals should be required to prove a degree of fault. There were insufficient grounds, he wrote, for scuttling the libel laws in the states in wholesale fashion.[45]

Within six months of *Gertz*, the states began establishing the standards of fault for private persons. They also began defining negligence.

Setting The Standards

Twenty-four states[46] and the District of Columbia have established negligence as the standard of fault private persons must prove to win libel verdicts (Appendix I). Seven other states[47] have not firmly established negligence as the private-person standard, but have recognized the *Gertz* ruling and are leaning toward that standard (Appendix II). An examination of libel cases in which negligence was a factor, however, indicates that negligence standards range from the vague to the specific. The present study was based on an examination of every negligence-related case that could be found from 1974 through 1984.[48] Of the more than 50 cases examined, at least 45 were from state appeals courts.

Part of the problem in defining negligence, apparently, is that there is little guidance in *Gertz* to help states. Indeed, the word "negligence" is not used in the majority opinion by Justice Powell.[49] Powell simply writes that, " . . . so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private person."[50] Powell indicated that civil liability may be based upon actions of "a reasonably prudent editor or broadcaster."[51] Justices Brennan and

Douglas were disenchanted with the establishment of a negligence standard for private persons, but for different reasons. Douglas noted in his dissent that, under the simple negligence standard, a jury could impose damages "upon finding that the publisher failed to act as a 'reasonable man.'"[52] Brennan wrote of the elusive nature of the "reasonable-care" standard, noting that it could cause self-censorship or could allow juries to convert it into an instrument for punishing the press.[53] The references to a "reasonable man" or "reasonable care" standard are no more definitive than the reference by Powell.

Definitions of negligence are not difficult to come by. For example, the *Restatement (Second) of Torts* attempts to solve the problem with what purports to be a simple definition of negligence:

> . . . conduct that creates an unreasonable risk of harm . . . . The standard of conduct is that of a reasonable person under like circumstances. Insofar as the truth or falsity of the defamatory statement is concerned, the question of negligence has sometimes been expressed in terms of the defendant's state of mind by asking whether he had reasonable grounds for believing that the communication was true.[54]

The *Restatement*, however, also recognizes a standard of negligence that applies to professionals — malpractice. It notes that a person who is a member of a profession or trade "is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities."[55]

Likewise, when states have defined negligence as the standard of fault for private persons to prove, they have usually defined it as either a violation of actions that would be taken by a reasonably careful man, or as a violation of standards of conduct common to the news industry — that is, as either a reasonable man or a journalistic malpractice standard. The Practising Law Institute predicted in 1982 that more states would adopt the media industry standard than the reasonable man standard.[56] Just the opposite has happened, and some states have spurned the industry practices standard outright. Eight states,[57] have adopted the reasonable man standard — also called the reasonable care or ordinary care standard. The District of Columbia and six other states[58] seem to be leaning toward the standard. Those seven jurisdictions have established negligence as the standard of fault for private libel plaintiffs, but have not defined negligence. Four states[59] have defined negligence as a departure from standards of conduct in the industry — journalistic malpractice — and one other[60] is leaning toward such a definition.

Another level of negligence is emerging, however. Five states[61] define negligence in relation to whether the defendant had reason to believe the material he published was true. The basis for such a standard appears to be at the end of the *Restatement's* definition of negligence.[62] That level of negligence seems to be related to the actual malice standard of knowledge

of falsity, though it does not give the protection of the actual malice standard to the press.

Ordinary Care. Most states that have wrestled with negligence have opted to establish no definition or to establish a relatively vague definition. States that have established negligence under the reasonable man or ordinary care standard, for example, have stated that a publisher has an obligation "to exercise reasonable care"[63] or ordinary care,[64] or must act as an "ordinarily careful person would act under the circumstances,"[65] or as a "reasonably prudent person" would have acted "under the same or similar circumstances."[66]

A more precise definition of ordinary care can only be fleshed out when the courts begin applying that definition to actions by reporters and begin to determine when certain actions constitute negligence. To some degree, the courts have begun such determinations. In general, courts have ruled that negligence could be present when reporters and their sources differ in their accounts of what the sources told reporters and when reporters, in the view of the court, do not gather and use information carefully.

A Kentucky appeals court, for example, ruled that a reporter did not exercise ordinary care when he reported that Jeff Girdler, 11, died after his head was pounded on the ground in a fight with 12-year-old Donnie Cholmondelay. In fact, Cholmondelay had struck Girdler once. The reporter testified that the police chief and Jeff's mother supported the account that Jeff's head had been pounded on the pavement. The chief and Mrs. Girdler, however, in their testimony, denied telling Blair that story. The court ruled that Blair was negligent.[67]

Similarly, in 1979 a U.S. District Court judge ruled that negligence was possible in a case in which a reporter testified that he had received information he published in a news story from a prosecutor.[68] The Kingsport (Va.) *Times-News* was incorrect in its report that a woman charged with murder had been ordered to have a mental examination. The reporter who wrote the story was not at the hearing in question, but talked with the prosecutor after the hearing. He and the prosecutor gave differing versions of the conversation, and the reporter admitted that the prosecutor may have misunderstood a question. The judge said the question of negligence should be decided by a jury.

On the other side of the coin, when sources and journalists agree on the content of the defamatory information relayed by sources to journalists, some courts have ruled that negligence did not exist. In a Florida case[69] and a Louisiana case[70] reporters received information from government sources that was incorrect and defamatory. In both cases, however, the reporters wrote accurate accounts of what they were told by the sources. Summary judgments for the newspapers involved were affirmed because of the absence of negligence.

Courts also have ruled that the media could be found negligent for

publishing information from unprivileged documents issued by privileged sources, if the information in those documents is false. In *Melon v. Capital City Press*[71] the Louisiana Court of Appeals reversed a summary judgment for a newspaper on grounds that the reporter for the paper should have investigated further information he received in a news release from the sheriff's department. The release contained information that could be interpreted in more than one way, the court ruled, and the reporter should have had reason to doubt the release's accuracy.[72]

Two other cases highlight trends by courts to require the media to gather and use information carefully. Reporters for the Louisville *Times* were told by a woman that a local attorney offered to have a drug possession case against her "fixed" by bribing a judge.[73] The reporters hid a microphone on the woman and she attempted to get the attorney to repeat the offer while the conversation was being taped. The attorney did not repeat the offer outright, but the paper published a story about the allegation, including descriptions of the attempt to have the offer taped. The Kentucky Supreme Court found the publication negligent and reversed a lower court's summary judgment for the newspaper.

The Tennessee Supreme Court, in the second case, ruled that a newspaper's failure to publish all the facts of a story, even though the facts that were published were true, could be construed as negligence, and a libel case arising from the story in question should go to trial.[74]

The Memphis *Press-Scimitar* reported on June 5, 1971, that Ruth A. Nichols was shot in her home by a woman who arrived at the Nichols home and found her husband with Mrs. Nichols. The story was true but did not mention that, in addition to the woman's husband, Mrs. Nichols' husband and two neighbors were at the Nichols home at the time of the shooting. Two police reports were involved. One did not mention Mrs. Nichols' husband or the neighbors; the other did. At trial, the availability of the reports to the press was in dispute. "The publication of the complete facts," the court ruled, "could not conceivably have led the reader to conclude that Mrs. Nichols was involved in an adulterous affair."[75] The trial judge's dismissal of the libel suit was overruled and the case was remanded by the state supreme court for trial.

In other cases, however, district courts have ruled that book publishers are not required to independently verify all statements written by a reputable author, but can rely on the author's research, absent circumstances that would cause suspicion,[76] and that a magazine of national circulation is not required to check to see whether companies exist that bear the same name as the subject of a defamatory article.[77]

Journalistic Malpractice. One concept that has grown out of *Gertz* and was reinforced in the *Restatement*[78] is that negligence is the failure to adhere to standards of reporting and writing that are common to the news industry. The concept has sparked considerable controversy.

Malpractice in tort law refers to standards adhered to by professionals.[79] Those professionals, in turn, are often bound by written codes of conduct and are licensed — methods of regulating professionals that are considered by most journalists to be repugnant. In journalism, then, who determines what standards are "proper?" If a jury finds that *no* standards exist, does it base its decision in a libel trial on standards the jury believes *ought to* exist? Must the underground paper published in a basement in downtown Los Angeles follow the same standards as those of the Los Angeles *Times*?

A California resort hotel sued *Penthouse* for a 1975 article in which the magazine reported that the resort was backed and frequented by organized crime figures. During the trial, which ended in May 1982, Dale Spencer of the University of Missouri School of Journalism testified that *Penthouse* had conformed to the generally accepted procedures in the journalism industry for verification of investigative reporting. Kenneth Devol of California State University at Northridge testified that the magazine did not conform to existing procedures. Both professors based their testimony on the fact that the magazine did not independently verify the article it published. *Penthouse* relied instead on a review by outside legal counsel who examined the material the authors used.[80]

Despite these problems, Oklahoma, Kansas and Utah have adopted the journalistic malpractice definition of negligence. South Carolina is leaning toward such a definition and there may be an open question as to the standard in Ohio. The Oklahoma Supreme Court has established that:

> Ordinary care is that degree of care which ordinarily prudent persons engaged in the same kind of business usually exercise under similar circumstances and the failure to exercise such ordinary care would be negligence . . . . Ordinary care under the circumstances is the same degree of care required of physicians and surgeons in Oklahoma.[81]

In a later case, the Oklahoma Appeals Court attempted to clarify the state supreme court ruling. In that case, the court found that a reporter had published incorrect information, but that he was not negligent because he violated no industry standards. Tommy Benson sued a television station that reported authorities investigating a bank robbery converged on Benson's house and found a man who said he did not know Benson. The report was wrong, but the court found that the report "reasonably reflects what a reporter could have concluded based on undisputed facts."[82] Quoting the standard from the state supreme court, the appeals court noted that, "It must be emphasized that this standard required the recognition of the peculiar needs of the electronic and printed media . . . .The need to report matters as quickly as possible is not merely good competition but serves a paramount concern of society to have access to information of public concern as soon as possible."[83]

The Kansas negligence standard is almost a cross between the reasonable man and the media practices definitions. The Kansas Supreme Court defined negligence as failure to exercise reasonable care and defined reasonable care as, "The conduct of the reasonably careful publisher or broadcaster in the community or in similar communities under the existing circumstances."[84]

The Utah Supreme Court ruled that negligence is "a departure from standards which exist or ought to exist as standards of professional conduct in the news media industry."[85] The court ruled that juries should not be allowed to conclude that negligence necessarily exists because the published defamatory statement was false, and concurred with Comment G to section 580B of the *Restatement*, which sets forth evidentiary standards in determining negligence.[86] That section points out that the customs and practices within the profession are relevant in applying negligence and that expert testimony could give juries insight about those customs and practices. Apparently, the court determined that one custom that "ought to exist" in the industry was that a medium must present both sides of a controversy. The court remanded for trial a libel action against a television station. The station had aired a news segment about possible cruelty to animals without interviewing the owner of the animals.

In June 1974, based on a letter from a viewer, the "Action Reporter" for KSL-TV in Salt Lake City, Don Olsen, visited a horse farm belonging to Garth Seegmiller. Based on the visit and other information, Olsen ended his broadcast with, "Mr. Seegmiller, the alleged owner of the horses, was not available for comment today." Seegmiller sued the station and, at trial, denied he was cruel to his animals. He responded to each of the charges made in the broadcast. At the close of the plaintiff's case, however, the trial court directed a verdict for the television station. Seegmiller appealed.

The Utah Supreme Court did not comment on the actions of the station and Olsen and reversed the trial court's ruling on other grounds.[87] If there was no negligence, however, the court could have so ruled and dismissed the case. The indication is that a jury could find the actions of Olsen and the station negligent.

South Carolina has not adopted the journalistic malpractice definition of negligence, but the state supreme court has made a ruling indicating such a definition is preferred. *Jones v. Sun Publishing Co.*[88] was the result of a story in a Myrtle Beach, S.C., newspaper which reported that James Jones, his father and his uncle pleaded guilty in U.S. District Court to copyright infringement in a stereo tape pirating case. In fact, James Jones was the only member of the trio who did not plead guilty. He sued and won a $35,000 judgment. The reporter who wrote the story received his information in a telephone conversation with the assistant

U.S. attorney who prosecuted the case. The attorney testified that he had previously confused the Joneses, but said he had the records of each man before him when he talked to the reporter. He admitted that he did not remember what he told the reporter.

The South Carolina Supreme Court did not establish, *per se*, negligence as the private-person standard of fault, but ruled in the *Jones* case as if negligence *was* the standard. The plaintiff, the court said, must show "some measure of legal fault."[89] The court did not define negligence, but ruled that a jury could determine negligence existed because the reporter "departed from acceptable standards of reporting when he failed to check the public record himself, rather than relying on information supplied over the telephone."[90] The court, apparently, established that the acceptable standard of reporting was that the reporter get his information from documents rather than from interviews. Two justices, in dissent, complained that the majority established a standard that will find a defendant liable whenever he relies on an official source who is mistaken.[91]

The Ohio Supreme Court, in January 1984, established that ordinary negligence is the private-person standard of fault for that state,[92] but an Ohio court of appeals had previously indicated a preference for journalistic malpractice in a ruling that may yet have some precedent.

The appeals court found that a reporter was not negligent in a case because the reporter had not violated the procedures of newsgathering. In *Horvath v. Ashtabula Telegraph*,[93] the court found that a reporter who had interviewed a number of persons close to a firm alleged to be laundering drug money, but had not interviewed the owner of the firm, had "exercised ordinary care" in the preparation of his article. In making such a ruling the court analyzed the "various procedures engaged in" by the reporter, and had compared those procedures to procedures "used by other similar news reporters." The court found the reporter was "well within the bounds of professionalism in the news gathering business."[94]

The case began when the Ashtabula (Ohio) *Telegraph* reported in 1979 that George C. Horvath, owner of Horvath Service, was being investigated for laundering money from a drug business through his firm. Horvath's father, George J., the true owner of Horvath Service, sued and won a $150,000 libel verdict.[95] The reporter had interviewed law enforcement officers, neighbors of a house raided by officers, the local prosecutor and an associate of counsel for George C. Horvath. He did not call Horvath Service to discuss the allegations with officials there and he did not talk to George J. Horvath. In answering the charge that failure to do so was negligence, the court ruled:

> Is a reporter required to call an entity such as Horvath Service and determine if said service is laundering money from a drug business? To ask this question is to

> answer it! It is ludicrous to think that such a telephone call would produce an answer, let alone an answer that the reporter could conclude was reliable.
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> . . . .
>
> We find therefore that when the negligence standard applies as we find it to apply in this case, there is no obligation to interview the party concerning whom an accusation is made.[96]

The state supreme court, in establishing negligence as the private-person standard of fault, did not define negligence, other than to say that it would be failure of the defendant to act "reasonably in attempting to discover the truth or falsity or defamatory character of the publication."[97] The *Horvath* ruling may have precedential value, therefore. Just as Oklahoma has defined ordinary care in terms of journalistic malpractice, Ohio could define the reasonable attempt to discover truth or falsity in terms of journalistic malpractice as presented in *Horvath*. The *Horvath* ruling apparently was reported only in the *Media Law Reporter*, not in either official reporting service for Ohio — Ohio App. 2d or N.E.2d. *Horvath* was neither cited nor discussed by the state supreme court when the court established negligence as the private-person standard of fault for Ohio. Horvath may have been overlooked because it was not reported in the official reporting services or it may have been ignored because it was simply poor law.

Some courts have patently rejected the industry standards definition of negligence. In Massachusetts, for example, a reporter who was being sued for libel asked that the judge allow expert testimony concerning the customs and practices among professional journalists. The judge rejected the request and the Massachusetts Supreme Judicial Court upheld the judge's ruling. Adoption of such a standard, the court ruled, might mean approval of a standard below that of ordinary care: "Negligence throughout a trade should not excuse its members from liability."[98] The court added that it would hesitate to involve courts in fashioning rules for journalistic practice and "Due care in gathering information is not technical matter for which a jury unaided by experts would have no basis for decisions."[99] Likewise, a New York court ruled that expert testimony was unnecessary because, "The elementary standards of basic news reporting are common knowledge."[100]

The Arkansas Supreme Court rejected the industry standards definition of negligence, but for a different reason. In 1979, the court established ordinary negligence as the standard of fault for private persons in Arkansas.[101] In 1983, however, when a Little Rock television station lost a libel suit, it argued to the supreme court that the trial judge should have instructed the jury that negligence should have been determined based upon actions that a reasonably careful *broadcaster* in the community would have taken in like circumstances. The court rejected the argu-

ment, adhering to its previous determination that the actions of a reasonably careful *person* measure negligence. One justice, in his concurrence, indicated that the reason for the ordinary care standard was that the latter would "cause uncertainty and ultimately induce more self-censorship."[102]

Ironically, however, the Arkansas Supreme Court noted that evidence concerning practices common to the news industry would be admissible in determining what actions a reasonably careful person would take. The court ruled that "Nothing suggests that the appellant was prevented from showing what the standard in the industry is and such proof would be evidence the jury could use in making their determination of whether there was a breach of duty owed."[103]

And the concurring justice wrote:

> The concept of one legal measure for the negligence of a broadcaster, another for a newspaperman, and yet another for an ordinary individual is contra to the spirit of our constitutional provision. No logical distinction can be made between a spoken statement and a written statement. Of course, in determining what a reasonably careful person would or would no do, proof is admissible as to the generally accepted standard of professional journalistic conduct.[104]

The Illinois Supreme Court also rejected the journalistic malpractice standard. Such a standard, the court ruled, would make prevailing newspaper practices controlling.[105] The Illinois Supreme Court opted for a lack of ordinary care definition of negligence, but the definition took an added twist.

Reasonable Belief/Reasonable Doubt. The Illinois Supreme Court ruled that lack of ordinary care existed if the defendant knew publication was false or "believing it to be true, lacked reasonable grounds for that belief."[106] The standard sounds similar to the knowledge of falsity standard of actual malice and, in at least one Illinois case, the court interpreted failure to make what the court considered to be a reasonable investigation as evidence that a reporter may have had reason to doubt that his story was true.[107] The reporter wrote a story about the filing of a wrongful death action.

In 1976 the estate of Joan Marie Dini filed a wrongful death action against George O. and Kathleen Newell. Dini's death came January 18, 1976, during a fire at the Newell home, where she was a guest. In part, the complaint stated that Newell attempted to save his pet parrot but "made no immediate attempt to reach decedent" to wake her, or to help her escape. The Chicago *Daily News* ran a story about the complaint under the headline "Saved Parrot, Let Woman Die, Suit says." The article was based entirely on the civil complaint. The Newells sued the *Daily News* for libel, claiming the article was inaccurate and that the *Daily News* did not believe the truth of the article when it published the story.[108]

The Illinois Appeals Court wrote, " . . . we believe a genuine issue of fact exists as to whether defendant published article with a reasonable belief in its accuracy . . . . The discrepancies between the Dini complaint and the article permit an inference of negligent reporting."[109] The discrepancies, however, were minor. For example, the court found this paragraph to be inaccurate: "When the fire broke out, Newell rescued his parrot, but did not attempt to rescue Miss Dini from an upstairs bedroom in the home, the suit charges." The court found the paragraph inaccurate because, even though Newell first removed the parrot from the home, after he was outside he attempted to break the window of the upstairs bedroom where Dini slept. This was an attempt to rescue Dini, the court said, and was noted in the wrongful death action from which the reporter got his information.[110] The case was remanded for trial on the merits.

Hawaii, Texas, Massachusetts and Washington have established, as the private person standard of fault, the reasonable belief or reasonable doubt measure. In three of the states, however, there have been insufficient cases to make a determination of how the standard will be applied. The Hawaii Supreme Court ruled that negligence can be established if "defendants did not have any reasonable grounds to believe the defamatory statement was true and in publishing it failed to exercise reasonable care."[111] The negligence standard for Texas is that the publisher or broadcaster "knew or should have known that the defamatory statement was false."[112] Washington established negligence as publication of a statement where there is substantial danger to reputation when the defendant "knew or, in the exercise of reasonable care, should have known that the statement was false or would create a false impression in some material fact."[113]

Massachusetts has established negligence as reason to doubt, but applications of the standard do not seem to be uniform. The reason-to-doubt standard was established in *Stone v. Essex County Newspapers.*[114] In that case a reporter had written a story about a drug-possession trial in which a law enforcement officer, in testimony, named the owner of some illegal drugs. When the reporter's city editor read the story, he was surprised because he recognized the man named as an "excellent citizen." The city editor trusted the reporter's accuracy, however, and passed on the story. In fact, the reporter had been sitting near the back of the courtroom and had misheard the officer's testimony. As a result, he reported the name of the drug owner incorrectly. Because the editor had "reason to doubt," the Supreme Judicial Court of Massachusettes ruled that negligence existed.[115]

The Appeals Court of Massachusetts, in two cases, seemed to hold to the spirit, if not the letter, of the reason-to-doubt standard. In *Liquori v. Republican Company,*[116] the court ruled that negligence existed when a reporter wrote that the wrong Anthony Liquori had pleaded guilty to a

series of break-ins. The reporter, from an indictment, learned that Liquori was from Agawan, but failed to get Liquori's address from other court records. Back in the newsroom, the reporter looked up Liquori's name in the Agawan telephone book, found only one Anthony Liquori listed and reported the man's address in his story about the guilty pleas. That was not the Anthony Liquori who had been in court. The Massachusetts Court of Appeals found that the reporter could have gotten the correct information from the trial court or from Liquori's attorney, whose name was published in the story, without having delayed publication. The newspaper, therefore, was negligent.

In *Cefalu v. Globe Newspaper Co.*,[117] the same court ruled that negligence did not exist when a newspaper did not interview every person standing in an unemployment line before publishing a photograph of the line to illustrate a story about unemployment. One person standing in the line sued the newspaper because, he said, he was not waiting for unemployment benefits, but was there to act as a translator for another man. The photographer had ascertained that the line was for unemployment and could not have known the translator was there without interviewing every person in the line, which was an unjustified burden, the court found. No negligence existed.

In a third case, however, the Massachusetts Supreme Judicial Court stretched the reason-to-doubt standard. The court found that a reporter was negligent when the reporter's notes did not delineate to the court's satisfaction which of seven sources made a specific statement the reporter used in a story.[118] In a column on the Blue Hill Avenue area of Boston, Boston *Globe* columnist Michael Barnicle reported that James Schrottman said, "Life on Blue Hill Avenue in 1972 . . . is 'o.k. if you're a nigger.'"[119] Schrottman denied making the comment, sued Barnicle and claimed, in testimony, that Barnicle took no notes during the interview.

Barnicle testified that he had interviewed seven persons, took notes and used his notes and his memory to write the story. The trial judge examined Barnicle's notes and ruled, as a matter of law, that Barnicle had not taken notes during the interview with Schrottman. The quotation appeared in the notes, but was not within quotation marks and the judge could not determine to whom Barnicle attributed the remark.[120] Barnicle argued for testimony from expert witnesses concerning customs and practices among professional journalists, but the trial judge rejected the notion and the state supreme court affirmed the decision.[121]

The question that emerges is that of who determines when a publisher did not have "reasonable belief" in the accuracy of a published article. When did he have reason to doubt? In the Dini case, for example, the court determined that the publisher did not have reason to believe the accuracy of the story. The errors the court said it found gave the inference of negligent reporting. So, while the language of the standard implies ac-

tual malice, the application seems to be a long way from that stringent protection. In practice, there seems to be a reversion to the old common law rule of libel: if it is wrong, it is libel.[122]

Conclusions

Negligence is a nebulous word. And other nebulous words — reasonable, prudent, ordinary, careful, proper — are being used to define it. To add to the confusion, each state is left to define negligence — just as, in 1973, the Supreme Court decided to allow each community to define obscenity.[123] States have begun defining negligence, but the definitions vary greatly from state to state, and, if the *Gertz v. Welch* rule lasts, the definitions will continue to vary.

One example of the confusion is the Arkansas case discussed above. The Arkansas Supreme Court adhered to the ordinary neligence standard it had previously established, but a majority of the court indicated that testimony concerning standards of conduct common to the journalism industry would be relevant in determining what an ordinary person would reasonably do.

In addition, there seems to be overlap in definitions of negligence regardless of the standard established. Trusting a prosecutor in an interview, for example, can get a reporter in trouble under both the ordinary negligence and journalistic malpractice standards.[124]

Two primary questions seem to emerge from a discussion of negligence: (1) which standard is best, and (2) regardless of the standard, what can a publisher or broadcaster do to ensure that he or she will not be found negligent? Despite the variations from state to state, there appear to be some general guidelines for answering these questions.

Standards of (Negligent) Reporting. Each standard seems to have its own set of pitfalls. The ordinary care standard is too vague. It could allow a judge or jury to find a reporter negligent because the judge or jury disagreed with the way the reporter did his or her job or with what the reporter included or excluded from his story. Because of the lack of clear guidance, a court might say, as did the Tennessee Supreme Court, for example, that a jury should rely on its own experience and instincts in determining reasonable care.[125] A jury's experience of what is reasonable may be based on "Lou Grant" or *All the President's Men.*

Additionally, it may be a misnomer to call the standard the "reasonable man" standard. Would not the reasonable man trust a news release he received from his sheriff's department or a report he received from police officers? Yet, reporters who took both of those actions were found negligent under the reasonable man standard.[126]

Similarly, the reason-to-doubt standard seems to give the courts too much latitude in determining negligence. While the standard sounds

similar to a reckless disregard standard, it does not provide the constitutional protection of such a standard. As demonstrated in the *Schrottman*[127] and *Newell*[128] cases, the court can make judgments on what the reporter believed, or how he or she used the material, or how he or she made use of notes.

The standard that seems to have the best mechanism for determining negligence and seems to be most in line with the intent of *Gertz* is the journalistic malpractice standard. It allows the actions of a reporter to be compared to a set of actions common to reporting and newswriting. The standard is more precise than the ordinary care and reason-to-doubt standards, and more guidance is available in determining negligence under that standard.[129] It might also be argued that the malpractice standard *must* apply to libel cases with media defendants. If journalism is a profession in which its members offer services to the public, should not the malpractice standard discussed in section 299A of the ***Restatement***, rather than the simple negligence standard discussed in section 580B, apply? Of course, such an argument calls into play a number of other controversial questions about the nature of the news media and of newsgathering, but such an argument does seem viable.[130]

The journalistic malpractice standard has some weaknesses. Standards of reporting vary from medium to medium; there is disagreement over what practices are common to the industry; and, there is disagreement over what actions are "proper." Indeed, there is even disagreement over whether all media can be considered a part of a single "industry." Some courts may be justified in rejecting the standard because of a fear that overall media performance in a particular community might lower the negligence standard to below that of ordinary care. Also, there is a genuine concern about courts determining what may or may not be proper standards for reporting.

A negligence standard similar to that of Kansas or Oklahoma, however, seems to avoid many of the criticisms of the journalistic malpractice standard while drawing upon the advantages. First, such a standard recognizes the differences between the reasonably careful person and the reasonably careful editor or publisher. The two are not the same, and the pressures and constraints of the newsgathering business pose special problems. A reasonably careful person thrust into a newsroom might make some unreasonable decisions. A reasonably careful publisher would not. The U.S Supreme Court has recognized the special nature of the newsgathering business. The Court has recognized the pressures of deadlines[131] and the constraints of space.[132] Additionally, the only guidance from *Gertz* that states can draw upon in defining negligence seems to be that negligence is related to the actions of a "reasonably prudent editor or broadcaster."[133] The Kansas rule specifically states that negligence should be measured against the conduct of a reasonably

careful publisher or broadcaster.[134] Oklahoma requires that negligence be measured against the actions of "ordinarily prudent persons engaged in the same kind of business . . . ."[135]

A negligence standard focusing on the actions of a reasonably careful publisher eliminates the concern that a journalistic malpractice test would mean judging a defendant's actions against a sea of negligence. Even if other media in a community are woefully negligent, Kansas and Oklahoma require that negligence be measured against the conduct of a reasonably prudent editor or publisher. Such a publisher, presumably, would not be negligent.[136] Kansas also requires that the conduct of the defendant be compared to that of a reasonably prudent editor or journalist "in the community or similar communities."[137] A jury, then, is not required to judge the conduct of a publisher in a community overrun by negligent reporting, but in a community of like population, economy and social structure.

The second major advantage of such a negligence standard is that it requires a comparison of actions under the existing circumstances or similar circumstances. The rule means that actions of similar media would be compared under similar reporting and publishing circumstances. The actions of a reporter for a weekly newspaper, for example, would be compared to the conduct of reasonably careful reporters on similar weekly newspapers. Expert testimony would be necessary to determine what actions were common and reasonable. The testimony would vary depending upon the case and the medium involved. An expert on standard procedures for a monthly, large-circulation magazine, for example, might not be an expert on the procedures that govern a daily newspaper or a weekly newsmagazine or a television news show or a book publisher.[138]

The problem is that judges and juries will still be deteriming, to some extent, whether a reporter is negligent. Whenever such a determination is being made by a government official or body there is opportunity for the press to be punished for publishing unpopular ideas or discussing unpopular topics. Under a journalistic malpractice rule such as one established by Kansas or Oklahoma, however, reporters, editors, publishers and broadcasters should feel more comfortable about letting juries make such decisions. The rule is a more realistic gauge of when a journalist is negligent than telling juries the journalist should have exercised ordinary care and then letting the jury decide what that means.

Standards of (Non-Negligent) Reporting. Under *Gertz* each state could have its own standard of fault for private libel plaintiffs or could interpret a standard differently from another state. To further complicate matters, as has been demonstrated, tag lines like "reasonable man" and "journalistic malpractice" many times mean very little. In many cases, standards merge so that one cannot distinguish between them. Indeed, in some instances a reasonable man standard and a malpractice standard

might be identical.

Despite the fuzziness of the different standards or, perhaps, because of it, some general rules seem to apply to rulings in negligence cases. Those rules are: (1) if there is a discrepancy between what a reporter says he was told by a source and what the source said he told the reporter, the court is more likely to believe the source and find that negligence is likely; (2) courts are likely to rule that negligence could be established if media representatives make little or no effort to contact a person against whom accusations are made or if a medium bases a story later found to be false upon a single source; (3) courts are likely to rule that negligence could be established if media fail to get all the information they should.

Using those general rules as a guide, the media can develop their own sets of rules to ward off rulings that they acted with negligence — regardless of whether negligence is defined as action taken by a reasonable man or standards of professional conduct within the industry.

The rules are ones good reporters already should know. Reporters should: take good notes — notes that are easily readable — and, when possible, tape interviews; verify information; talk to all parties in a controversy, regardless of the issue; double check information received from law enforcement officers and, when possible, check to see if privileged documents are available for examination; listen carefully, record accurately; make sure sources understand questions fully and are clear in their answers. The list could come out of a basic textbook in newswriting and reporting.[139]

Phelps and Hamilton advise reporters to make all the routine checks and to verify information carefully. They write:

> A single source should not be accepted as final if there are other places to check. Most important of all . . . every effort should be made to communicate with the maligned person to get his side of the story. If he cannot be reached, his attorney, his public-relations man or even his wife or a friend should be contacted. And if all efforts fail, the attempt to reach him should be written into the story . . . . If a newspaper, magazine or broadcasting company has made a mistake, there is nothing quite so telling as the point that it could have been prevented by communicating with the person who was libeled.[140]

The key term, writes Pember, is "good faith effort."[141] Media, Pember writes, should attempt to develop standards of care: "Reporters need to become better bookkeepers and undertake to keep records on how and when they investigate the veracity of libelous charges."[142]

A rule for reporters and the media they represent may be to establish set procedures for investigating stories and verifying information. Two cases illustrate the point.

A U.S. District Court Judge in Virginia, in ruling for *Time* magazine in a libel case, said *Time* was not at fault when the magazine failed to include an attorney's middle initial in a story and another attorney with the same first and last names but a different middle initial was mistaken for the at-

torney named in the story.[143] The judge said *Time* had followed its standard procedures in preparing the essay and that it was standard for *Time* to use no middle initials. Likewise, the Iowa Supreme Court determined that negligence did exist in one case, partly because the newspaper involved had no standard procedures.[144] A reporter for the *Des Moines Register and Tribune* confused two police officers from two different towns and erroneously reported that one officer pleaded guilty to a crime. The officer was a public official and the court ruled that actual malice could not be shown. But, the court said, the newspaper had no "rules, regulations, standards, policies or procedures which required verification of the facts of the story before it was published."[145] The lack of such procedures, the court ruled, constituted negligence.[146]

A definition of negligence may still be a long way off. As one court said, "The difficulties faced by the adoption of the negligence standard are many. It will take a generation of litigation to qualify and explain what the negligence standard means."[147] It has been 10 years since *Gertz v. Welch* mandated the negligence standard. Half a generation has passed. If media learn from the lessons of the first half of the generation, negligence will be found in few cases during the second half. While courts may not have always agreed on the legal definition of negligence, most courts, thus far anyway, have recognized sloppy reporting. And the best protection from a finding of negligence is the elimination of sloppy reporting.

Appendix I

Negligence Standards By States

Alabama

Mead Corporation v. Hicks, 10 Med. L. Rep. 1030 (Ala. 1983). " . . . Whether the defendant acted as a reasonable, prudent person under the circumstances," but the "thoroughness of the check that a reasonable person would make before publishing the statement" may be considered.

Arizona

Paegler v. Phoenix Newspapers, 114 Ariz. 309, 506 P. 2d 1216(1977). Failure to use reasonable care. *Restatement (Second) of Torts*, section 580B.

Arkansas

Dodrill v. Arkansas Democrat, 265 Ark. 628, 590 S.W.2d 840 (1979), *cert. den.*, 444 U.S. 1076(1980). Failure to exercise ordinary care. But see, also *KARK-TV v. Simon*, 280 Ark. 228, 656 S.W.2d 228 (1983), standards of conduct in the industry may be considered; and, *Little Rock Newspapers, Inc., v. Dodrill*, 281 Ark. 25, 660 S.W.2d 933 (1984), expert testimony may not be allowed.

California

Widener v. Pacific Gas & Electric Corp., 75 Cal. App. 3d 415, 142 Cal. Rptr. 304(1977), *cert. den.*, 436 U.S. 918(1978). Negligence standard established without definition.

District of Columbia

Phillips v. Evening Star Newspaper, 424 A.2d 78 (D.C. App. 1980), *cert. den.*, 451 U.S. 989(1981). Negligence standard established without definition, but called "reasonable."

Florida

Miami Herald v. Ane, 10 Med. L. Rptr. (Fla. 1984). Ordinary Negligence.

Georgia

Triangle Publications v. Chumley, 10 Med. L. Rptr. 2076 (Ga. 1984). Ordinary care established, but publisher held to "skill and experience normally exercised by members of (the) profession."

Hawaii

Cahill v. Hawaiian Paradise Park Corp., 56 Hawaii 522, 543 P.2d 1356(1975). Negligence occurs if "defendants did not have any reasonable ground to believe the defamatory statement was true and in publishing it failed to exercise reasonable care."

Illinois

Troman v. Wood, 62 Ill.2d 184, 340 N.E.2d 292(1975). Defendant is negligent if he knew publication was false or, "believing it to be true, lacked reasonable grounds for that belief." Not a "journalistic malpractice" standard.

Kansas

Gobin v. Globe Publishing, 216 Kan. 223, 532 P.2d 76(1975). "The conduct of the reasonably careful publisher or broadcaster in the community or in similar communities under the existing circumstances" is reasonable care.

Kentucky

Scripps v. Cholmondelay, 569 S.W.2d 702 (Ky. Ct. App. 1977); *McCall v. Courier-Journal*, 623 S.W.2d 885 (Ky. 1981), *cert. den.*, 456 U.S. 975(1982). Negligence standard not defined completely in *Scripps*; clarified in *McCall* in relation to actions taken by a reasonably prudent person.

Maryland

Jacron Sales Co. v. Sindorf, 276 Md. 580, 350 A.2d 688(1976). Negligence standard established without definition, but reference to *Restatement (Second)*, section 580B.

Massachusetts

Stone v. Essex County Newspapers, 367 Mass. 849, 330 N.E.2d 161(1975). Negligence standard established as reason to doubt.

Mississippi

Brewer v. Memphis Publishing, 626 F.2d 1238 (5th Cir. 1980), *cert. den.*, 452 U.S. 962 (1981). Negligence standard established in dicta of this actual malice case without definition.

New Hampshire

McCusker v. Valley News, 121 N.H. 258, 428 A.2d 493(1981), *cert. den.*, 454 U.S. 1017(1981). The court said a private person under *Gertz*, "May recover . . . upon showing that the defendant was negligent . . . ." The standard was not directly applied to New Hampshire.

New Mexico

Marchiondo v. Brown, 98 N.M. 394, 649 P.2d 462(1982). Negligence not defined, but reference made to "ordinary negligence."

Ohio

Embers Supper Club v. Scripps-Howard Broadcasting, 9 Ohio St.3d 22, 457 N.E.2d 1164(1983); *Horvath v. Ashtabula Telegraph*, 8 Med. L. Rep. 1657 (Ohio Ct. App. 1982). Failure of defendant to act "reasonably in attempting to discover the truth or falsity or defamatory character of the publication" is negligence. But reference made to industry standards in *Horvath*.

Oklahoma

Martin v. Griffin TV, 549 P.2d 85 (Okla. 1976). Ordinary care is "that degree of care which ordinarily prudent persons engaged in the same kind of business usually exercise under similar circumstances and the failure to exercise such ordinary care would be negligence." It is the same degree of care required of doctors.

South Carolina

Jones v. Sun Publishing Co., 278 S.C. 12, 292 S.E.2d 23(1982), *cert. den.*, 459 U.S. 944(1982). The court did not formally establish negligence but in this case ruled that a jury could have found negligence and that "some measure of fault" is required.

Tennessee

Memphis Publishing Co. v. Nichols, 569 S.W.2d 415 (Tenn. 1978). A publisher must exercise reasonable care and caution.

Texas

Foster v. Laredo Newspapers, 541 S.W.2d 809 (Texas 1976). Negligence is established if the publisher "knew or should have known that the defamatory statement was false." Distinction between ordinary negligence and reckless negligence is not clear.

Utah

Seegmiller v. KSL, 626 P.2d 968 (Utah 1981). Negligence is the departure from standards of professional conduct which exists or ought to exist.

Virginia

Gazette v. Harris, 11 Med. L. Rep. 1609 (Va. 1985). Negligence not defined, but "the plaintiff may recover upon proof by a preponderance of the evidence that the publication was false, and that the defendant either

knew it to be false, or believing it to be true, lacked reasonable grounds for such belief, or acted negligently in failing to ascertain the facts on which the publication was based." Negligence only applies where the trial judge determines that the statement "makes substantial danger to reputation apparent," making such determination by judging whether the words "should warn a reasonably prudent editor" of their defamatory potenial.

Washington

Taskett v. King Broadcasting, 86 Wash.2d 439, 546 P.2d 81(1976). Negligence is established if the defendant knew or should have known, in the exercise of reasonable care, that the defamatory statement was false or would create a false impression.

Wisconsin

Denny v. Mertz, 1906 Wis.2d 636, 318 N.W.2d 141, *cert. den.*, 74 L. Ed.2d 147(1982). The publisher must exercise reasonable care so as to not cause foreseeable harm.

Appendix II

Undecided States Leaning Toward Negligence

Connecticut

Corbett v. Register Publishing Co., 33 Conn. Sup. 4, 356 A.2d 472(1975). Negligence is less than recklessness. A police officer must show actual malice, not negligence.

Iowa

McCarney v. Des Moines Register & Tribune, 239 N.W.2d 152 (Iowa 1976). An Illinois case establishing negligence is cited favorably, though not applicable to this case.

Louisiana

Marshburn v. Collin, 341 So.2d 1236(1976), revd. on other grounds, 355 So.2d 879(1977). Actual malice not required.

Montana

Madison v. Yunker, 489 P.2d (Mont. 1978). Fault, not actual malice, required for private persons.

North Carolina

Walters v. Sanford Herald, 31 N.C. App. 233, 228 S.E.2d 776(1976). Fault, at least negligence, must be proved. Case was dismissed without establishing standard because fault was not alleged.

Pennsylvania

Mathis v. Philadelphia Newspapers, 455 F. Supp. 406 (E.D. Pa. 1978); *Marcone v. Penthouse*, 533 F. Supp. 353 (E.D. Pa. 1982). No state appelate court has settled the issue but judges in these two federal cases predict that the Pennsylvania Supreme Court will establish negligence and, therefore, use the standard in their libel trials. See also, *Lorentz v. Westinghouse Electric*, 472 F. Supp. 946 (W.D. Pa. 1979).

Wyoming

Pring v. Penthouse, 7 Med. L. Rep. 1101 (D. Wy. 1971). A private person is not required to prove actual malice.

NOTES

1. William L. Prosser, John W. Wade and Victor E. Schwartz, *Cases and Materials on Torts*, 6th ed. (Mineola, N.Y.: Foundation Press, 1976), p. 145.

2. 418 U.S. 323(1974).

3. *Ibid.*, p. 347. See note 50 and accompanying text.

4. 376 U.S. 254(1964). The Court defined actual malice as the publication of defamatory material with "knowledge that it was false or with reckless disregard of whether it was false or not," pp. 279-280.

5. Negligence is generally defined as failure to exercise ordinary or reasonable care. William L. Prosser in his *Handbook of the Law of Torts* (St. Paul, Minn.: West Publishing Co., 1971) defines it as failure to do what a reasonable man would do under the same or similar circumstances, paragraph 32, p. 151. The reasonable man, Prosser writes, is the personification of a community ideal of reasonable behavior, paragraph 32, p. 150. Negligence, according to Prosser, is based on four points: (1) there is duty under law for conformation to a standard of conduct, (2) there is failure to conform to that standard, (3) there is a reasonably close causal connection that injury occurs, (4) there is actual loss or damage; paragraph 30, p. 143. See also, Prosser, Wade and Schwartz, *op.cit.*, pp. 146 ff.

6. New York has selected gross irresponsibility, *Chapadeau v. Utica Observer-Dispatch*, 38 N.Y.2d 196, 341 N.E.2d 569(1975). See also, *Greenberg v. CBS*, 69 A.D.2d 693 (2d Dept. 1979) (reference is made specifically to a gross negligence standard). It must be noted, however, that no state has yet precluded the establishment of negligence. All four states that have established actual malice as the standard of fault a private person must prove in libel cases have tied that standard to matters of general or public concern, a standard established in *Rosenbloom v. Metromedia, Inc.* (see note 34 and accompanying text) and later abandoned. No state has yet indicated that actual malice or gross irresponsibility is the standard in all cases. Indeed, the changeability of standards was recently demonstrated in Virginia. Compare *Mills v. Kingsport Times-News*, 475 F. Supp. 1005 (W.D. Va. 1979) and *Ryder v. Time*, 3 Med. L. Rep. 1170 (D.D.C. 1979) to *Gazette v. Harris*, 11 Med. L. Rep. 1609 (Va. 1985). The states establishing actual malice as the private-person standard are Alaska, *Gay v. Williams*, 486 F. Supp. 12 (D. Alaska 1979); Colorado, *Walker v. Colorado Springs Sun*, 188 Col. 86, 538 P.2d 450(1975), *cert. den.*, 423 U.S. 1025(1975); Indiana, *Aafco Heating & Air Conditioning v. Northwest Publications*, 321 N.E.2d 580 (Ind. App. 1974), *cert. den.*, 424 U.S. 913(1976); Michigan, *Peisner v. Detroit Free Press*, 266 N.W.2d 693 (Mich. App. 1978).

7. See D.W. Robertson. "Defamation and the First Amendment: In Praise of Gertz v. Robert Welch Inc.," *Texas Law Review*, 54:199-284; W.B. Giampietro, "Constitutional Rules of Defamation; or, It's Libel But is he Liable?" *Illinois Bar Journal*, 64:10-15.

8. Robert D. Sack, *Libel, Slander, and Related Problems* (New York: Practising Law Institute, 1980), p. 334; "In Defense of Fault in Defamation Law," *Yale Law Journal*, 88:1735-51.

9. See David O. Anderson, "Libel and Press Self-Censorship," *Texas Law Review*, 53:422-481.

10. See note 5 above.

11. This is not to imply that a clear definition of actual malice exists, *Herbert v. Lando*, 441 U.S. 153(1979), demonstrates some of the differences in the interpretation of actual malice. A discussion of actual malice and the definitions of that standard of fault, however, lies outside the scope of this monograph.

12. *Fox's Libel Act*, passed in 1792, provided that the jury should determine the issue of guilt. No longer could the judge direct a finding of guilt merely on proof of publication.

13. For a good examination of the British roots to common law in the United States with regards to press freedoms, see Fredrick S. Siebert, *Freedom of the Press in England, 1476-1776* (Urbana, Ill.: University of Illinois Press at Urbana, 1952).

14. For an excellent examination of the foundations of First Amendment concepts, see Leonard Levy, *Legacy of Suppression* (Cambridge: Harvard University Press, 1960).

15. Some inaccuracies, for example, were: that students in a protest in Montgomery sang "My Country, 'Tis of Thee," when they sang the National Anthem; that protest leaders were expelled for their part in the protest, when the expulsion was for demanding services

at a lunch counter in the Montgomery County Courthouse on another day; that students protested state action by refusing to register, when students did register but boycotted classes on a single day; that the dining hall was padlocked in an attempt to starve students into submission, when there was no padlocking and the only students barred from eating were the few who were not registered or did not have temporary meal tickets.

16. Witnesses from the advertising department of the *New York Times* testified that the agency from whom they received the advertisement was reputable and they had no reason to doubt anything in the advertisment, Record, Vol. 1, pp. 730-769.

17. Record, Vol. 1, pp. 602-667.

18. *New York Times v. Sullivan*, 273 Ala. 656, 144 So.2d 25(1962).

19. *New York Times v. Sullivan*, 376 U.S. 254(1964), pp. 271-272.

20. *Ibid.*, p. 280.

21. See Meiklejohn's "The First Amendment is an Absolute," *Supreme Court Review*, 1961:245.

22. Harry Kalven, Jr., "The New York Times case: A Note on 'The Central Meaning of the First Amendment,'" *The Supreme Court Review*, 1964:191, p. 221, footnote 125.

23. 379 U.S. 64(1964).

24. *Ibid.*, p. 73.

25. *Ibid.*, p. 77.

26. 383 U.S. 75(1966).

27. *Ibid.*, p. 84.

28. *Ibid.*, p. 86.

29. Including *Associated Press v. Walker*, 388 U.S. 130(1967).

30. *Ibid.*, pp. 154-155.

31. 390 U.S. 727(1968).

32. *Ibid.*, p. 730.

33. *Ibid.*, p. 731.

34. 403 U.S. 29(1971).

35. *Gertz v. Robert Welch, Inc.*, 417 F.2d 801(1972).

36. 418 U.S. 323, pp. 351-352.

37. *Ibid.*, pp. 347-348.

38. *Ibid.*, p. 348.

39. *Ibid.*, p. 347.

40. *Ibid.*, pp. 348-350. When the case was retried, Gertz produced evidence of actual malice to attempt to win punitive damages. He succeeded. A jury awarded him $100,000 in compensatory damages and $300,000 in punitive damages. The verdict was affirmed, 680 F.2d 527 (7th Cir. 1982).

41. *Ibid.*, pp. 253-254.

42. *Ibid.*, p. 355.

43. *Ibid.*, pp. 355-360.

44. *Ibid.*, pp. 361-369.

45. *Ibid.*, pp. 369-404; specifically, p. 370.

46. Alabama, Arizona, Arkansas, California, Florida, Georgia, Hawaii, Illinois, Kansas, Kentucky, Maryland, Massachusetts, Mississippi, New Hampshire, New Mexico, Ohio, Oklahoma, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, Wisconsin.

47. Connecticut, Iowa, Louisiana, Montana, North Carolina, Pennsylvania, Wyoming.

48. Research for this paper was based on a case-by-case study, using *Shepard's Citations* to locate every state and federal case that cited *Gertz v. Robert Welch, Inc.* As a cross-check and to search for recent cases and cases not reported in *Shepard's*, the *Media Law Reporter* was searched for every negligence-related libel case.

49. Blackmun, in his concurrance, first used the term negligence. He wrote that, " . . .the Court now conditions a libel action by a private person upon a showing of negligence, as contrasted with a showing of willful or reckless disregard," p. 353. The negligence or reasonable care stadard was referred to by all other writers: Burger, p. 355; Douglas, p. 360; Brennan, p. 366-367; White, p. 376. The use of the word negligence by members of the Court in defining Powell's minimum standard of conduct is in keeping with the use of negligence in tort law as the minimum standard of care required by persons under the law. See notes 1 and 5 and accompanying text.

50. *Gertz*, p. 347.
51. *Ibid.*, p. 348.
52. *Ibid.*, p. 360.
53. *Ibid.*, pp. 366-367.
54. *Restatement (Second) of Torts*, section 580B, comment g.
55. *Ibid.*, section 299A.
56. *Communications Law 1982* (New York: Practicing Law Institute, 1982), p. 472.
57. Alabama, Arizona, Arkansas, Florida, Kentucky, Ohio, Tennessee, Wisconsin.
58. California, Maryland, Mississippi, New Hampshire, New Mexico, Virginia.
59. Georgia, Oklahoma, Kansas, Utah.
60. South Carolina.
61. Hawaii, Illinois, Massachusetts, Texas, Washington.
62. See footnote 54 above and accompanying text.
63. Tennessee, *Memphis Publishing Co. v. Nichols*, 569 S.W.2d 415 (Tenn. 1978); Wisconsin, *Denny v. Mertz*, 106 Wis.2d 636, 318 N.W.2d 141(1982).
64. New Mexico, *Marchiondo v. Brown*, 98 N.M. 394, 649 P.2d 462(1982).
65. Arizona, *Paegler v. Phoenix Newspapers*, 114 Ariz. 304, 560 P.2d 1216(1977).
66. Kentucky, *McCall v. Courier-Journal & Louisville Times*, 623 S.W.2d 885 (Ky. 1981), *cert. den.*, 456 U.S. 975(1982).
67. *Scripps v. Cholmondelay*, 569 S.W.2d 702 (Ky. Ct. App. 1977).
68. *Mills v. Kingsport Times-News*, 475 F. Supp. 1005 (D.Va. 1979).
69. *Karp v. Miami Herald*, 359 So.2d 581 (Fla. Dist. Ct. App. 1978).
70. *LaBoeuf v. Times-Picayune Publishing Corp.*, 327 So.2d 430 (La. Ct. App. 1976).
71. 407 So.2d 85 (La. Ct. App. 1982).
72. The Capital City *Press* had been sued previously for publishing that another man had been arrested and charged in connection with a marijuana drug raid. The man had not been arrested. An appeals court found no negligence in that case because the name and charge were included in a list of 136 names and charges distributed in a news release. The authorities, the court said, had made the mistake. Ironically, the trial judge noted that reporters for the paper could have learned of the error by checking actual arrest records. He found negligence. The appeals court, however, said the paper was under no obligation to make such a check and reversed the trial judge's ruling. There was no showing of fault, the appeals court ruled. *Wilson v. Capital City Press*, 315 So.2d 393 (La. Ct. App. 1975).
73. *McCall*; see note 66.
74. *Memphis Publishing Co.*; see note 63.
75. *Ibid.*, p. 418.
76. *Dresbach v. Doubleday & Co.*, 418 F. Supp. 1285 (D.D.C. 1981).
77. *Lake Havasu Estates v. Reader's Digest Association*, 441 F. Supp. 489 (D. N.Y. 1977).
78. See notes 54 and 55 and accompanying text.
79. *Restatement*, section 299A.
80. James Phelan, "The Rising Price of Profs," *Columbia Journalism Review*, July/August, 1982, p. 16.
81. *Martin v. Griffin TV*, 549 P.2d 85 (Okla. 1976), p. 92.
82. *Benson v. Griffin TV*, 593 P.2d 511 (Okla. Ct. App. 1978), p. 514.
83. *Ibid.*, pp. 513-514.
84. *Gobin v. Globe Publishing Co.*, 216 Kan. 223, 531 P.2d 76(1975).
85. *Seegmiller v. KSL*, 626 P.2d 968 (Utah 1981).
86. *Restatement*, pp. 221-231
87. *Seegmiller, op. cit.*
88. 278 S.C. 12, 292 S.E.2d, 23(1982), *cert. den.*, 459 U.S. 944(1982).
89. *Ibid.*, 292 S.E.2d, p. 24.
90. *Ibid.*, p. 24.
91. *Ibid.*, p. 28.
92. *Embers Supper Club v. Scripps-Howard Broadcasting Co.*, 9 Ohio St.3d 22, 457 N.E.2d 1164(1984).
93. 8 Med. L. Rep. 1657 (Ohio Ct. App. 1982).
94. *Ibid.*, p. 1663.
95. *Ibid.*, p. 1659.

96. *Ibid.*, p. 1663.
97. *Embers, op. cit.*, p. 1167.
98. *Schrottman v. Barnicle*, 386 Mass. 627, 437 N.E.2d 205(1982), p. 214.
99. *Ibid.*, 437 N.E.2d, p. 215.
100. *Greenberg v. CBS*, 69 A.D.2d 693(1979), p. 710.
101. *Dodrill v. Arkansas Democrat*, 265 Ark. 628, 590 S.W.2d 840(1979), *cert. den.*, 444 U.S. 1076(1980).
102. *KARK-TV v. Simon*, 10 Med. L. Rep. 1049, p. 1055.
103. *Ibid.*, p. 1051.
104. *Ibid.*, p. 1055.
105. *Troman v. Wood*, 62 Ill.2d 184, 340 N.E.2d 292(1975).
106. *Ibid.*, 340 N.E.2d, p. 298.
107. *Newell v. Field Newspapers*, 91 Ill. App. 3d 735, 415 N.E.2d 434(1980). The Supreme Court, of course, has held that when the investigation of a story which is not hot news is grossly inadequate, actual malice may be inferred, *Butts v. Curtis Publishing Co.*, 388 U.S. 130, pp. 158-159. Failure to investigate does not always allow the inference of actual malice, however. See, for example, *Hotchner v. Castillo-Puche*, 551 F.2d 910 (2d Cir., 1977), *cert. den.*, 434 U.S. 834(1978).
108. *Newell, op. cit.*
109. *Ibid.*, p. 446.
110. *Ibid.*, p. 446.
111. *Cahill v. Hawaiian Paradise Park Corp.*, 58 Hawaii 522, 543 P.2d 1356(1975), p. 1364.
112. *Foster v. Laredo Newspapers*, 541 S.W.2d 809 (Tex. 1976), *cert. den.*, 429 U.S. 1123(1977).
113. *Taskett v. King Broadcasting Co.*, 86 Wash. 2d 439, 546 P.2d 81(1976).
114. 367 Mass. 849, 330 N.E.2d 161(1975).
115. *Ibid.*, 330 N.E.2d, p. 174.
116. 396 N.E.2d. 726 (Mass. App. Ct. 1979).
117. 391 N.E.2d 935 (Mass App. Ct. 1979).
118. *Schrottman, op. cit.*, note 98.
119. *Ibid.*, p. 214.
120. *Ibid.*, p. 208.
121. See notes 98 and 99 and accompanying text.
122. This negligence standard also bears a striking resemblance to actual malice as that term was defined in the common law prior to the 1964 decision in *Times v. Sullivan*. Courts had defined actual malice as failure to believe the truth of the charges made, *Boucher v. Clark Publishing Co.*, 84 S.W. 237 (S.C. 1900), or failure to have reasonable grounds for believing the truth, *Carpenter v. Bailey*, 53 N.H. 590(1873). For a more detailed discussion of actual malice before 1964 see 33 Am. Jur. Libel and Slander, sections 110-120 (1941).
123. *Miller v. California*, 413 U.S. 15(1973).
124. See, for example, note 68 and accompanying text, and note 88 and accompanying text.
125. *Memphis Publishing Co., op. cit.*, p. 1587.
126. See notes 71 and 74 and accompanying text.
127. See note 118 and accompanying text.
128. See note 107 and accompanying text.
129. See *Restatement*, pp. 221-231, and *Communications Law*, page 472.
130. The questions of whether journalists are professionals is controversial and is not likely to be settled so the malpractice standard can be applied to the news business as it is applied to medicine, the law and other professions. This question, however, seems to be a good one for further study.
131. *Curtis Publishing Co., op. cit.*
132. *Miami Herald v. Tornillo*, 418 U.S. 241(1974).
133. See note 51 and accompanying text.
134. See note 84 and accompanying text.
135. See note 81 and accompanying text.
136. The Virginia Supreme Court established a similar standard as a threshold determination that must be made before the question of negligence can be resolved. The court

did not define negligence, but in *Gazette v. Harris*, 11 Med. L. Rep. 1609 (Va. 1985), established negligence as the private-person standard in libel cases. The court wrote: "The application of this negligence standard is expressly limited, however, to circumstances where the defamatory statement makes substantial danger to reputation apparent." Otherwise, actual malice applies. The judge determines whether there is substantial danger to reputation, p. 1614. In making such determination, the trial judge is to determine whether the words in the published material "should warn a reasonably prudent editor of its defamatory potential," p. 1618.

137. See note 84 and accompanying text.

138. David O. Anderson has reached a similar conclusion. See "Libel and Press Self-Censorship," *op. cit.*

139. See, for example, Warren K. Agee, Phillip H. Ault, Edwin Emery, *Reporting and Writing the News* (New York: Harper & Row, 1983); Curtis D. MacDougall, *Interpretative Reporting*, 8th ed. (New York: Macmillan, 1982); Melvin Mencher, *Basic News Writing* (Dubuque, Iowa: Wm. C. Brown, 1983).

140. Robert H. Phelps and E. Douglas Hamilton, *Libel – Rights, Risks, Responsibilities* (New York: Dover, 1978), p. 272.

141. Don R. Pember, *Mass Media Law*, 3rd ed. (Dubuque, Iowa: Wm. C. Brown, 1984), p. 146.

142. *Ibid.*

143. *Ryder v. Time*, 557 F.2d 824 (4th Cir. 1977).

144 *McCarney v. Des Moines Register & Tribune Co.*, 239 N.W.2d 152 (Iowa 1976).

145. *Ibid*, p. 160.

146. A good question for further research may be just how specific such procedures should be. For such procedures to be written newsroom policy, for example, could be more dangerous to media than the failure to have established procedures, since failure of a reporter to follow every detail on a list of procedures could be interpreted as negligence. As previously discussed, there are wide ranging differences on what procedures are proper.

147. *Taskett, op. cit.*, p. 90.

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